FLYNN

The History of Public Opinion on the Right of the Federal Judiciary to pass upon Congressional Legislation

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THE HISTORY OF PUBLIC OPINION ON THE RIGHT OF THE FEDERAL JUDICIARY TO PASS UPON CONGRESSIONAL LEGISLATION

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THIS IS TO CERTIFY THAT THE THESIS PREPARED UNDER MY SUPERVISION BY

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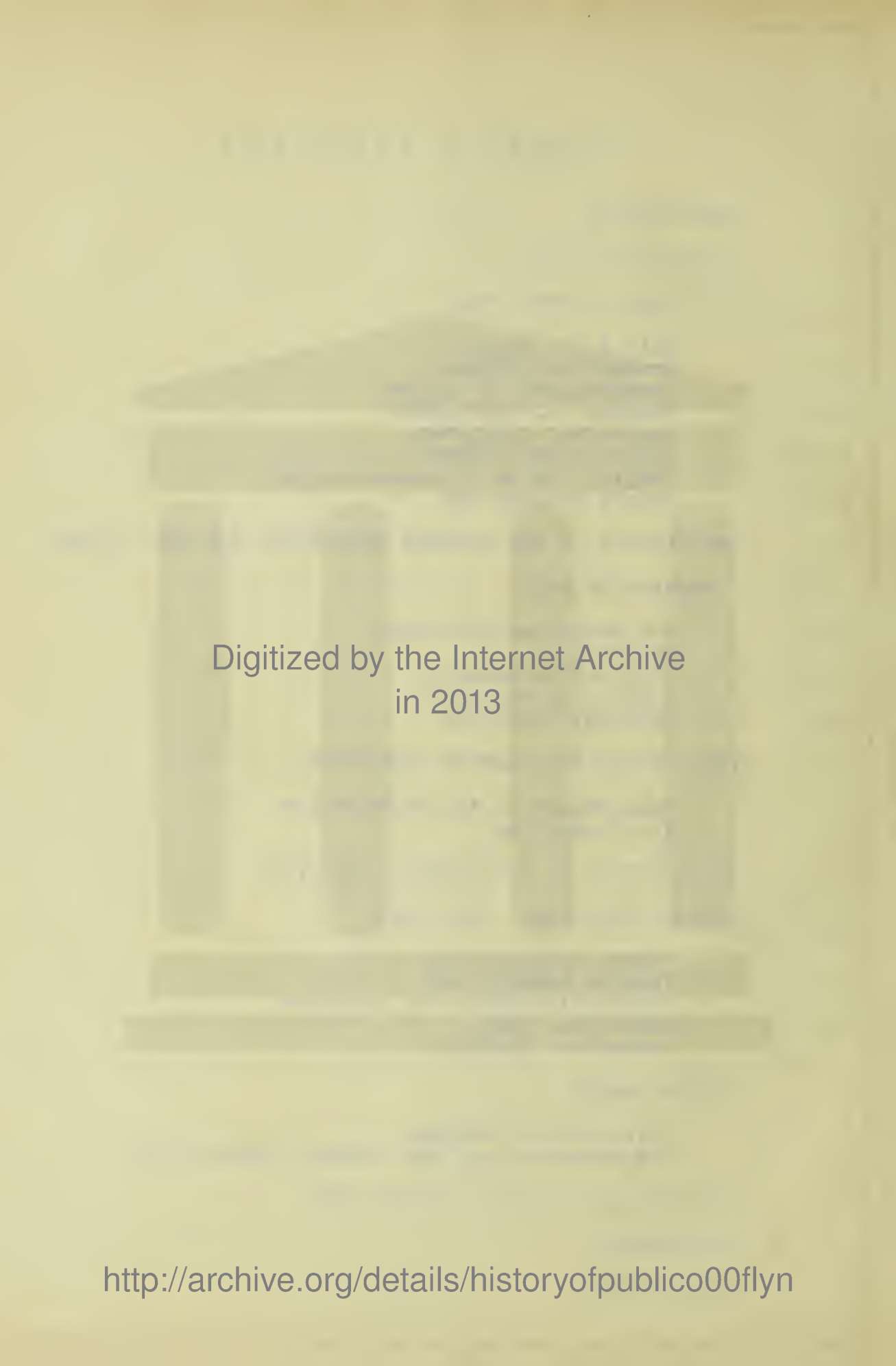
T A B L E O F C O N T E N T S



INTRODUCTION

In states where a constitution is regarded as the law of greater obligation, sooner or later, the question must arise, — who shall be its final interpreter and decide upon the compatibility of laws emanating from the legislative body under this constitution. It was therefore to be expected that the American people. accustomed to their charters and constitutions from the beginning, would raise this question at a comparatively early time. The attitude of public opinion as the question presented itself in the life of the American people down to 1800 is investigated in the following pages. The investigation will probably show that public opinion has solved the question only up to a certain point, that the question has been settled in a sort of temporary, superficial way. Public opinion, for the time being, it seems, has more or less only accepted a solution of the problem which until now has worked satisfactorily, but which may prove in the future to be far from final. Whether laws coming up from Congress may be rejected as unconstitutional, irrespective of their number, seems never to have been really touched upon. The federal judiciary has pronounced laws unconstitutional in but a few scattered cases, and in this, public opinion has acquiesced.

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COLONIAL PRACTICE

Among the generation of Americans that converted the colonies into thirteen "independent sovereign states," the idea of a supreme authority exercising the function of setting aside acts of legislative bodies which it deemed inconsistent with a higher law was a familiar one.[1] By guaranteeing to the colonists the right of appeal to the Privy Council, England, as it hoped, controlled the administration of justice in America.[2] Various means were used to disallow any enactments in conflict with the colonial charters. By forfeiture of the charter, by act of parliament, by the direct annulling of legislation through the agency of the Crown, but most important of all for our purposes, by judicial proceedings and an ultimate appeal to the Privy Council, England was able to secure the enforcement of the charters.[3] The supreme judicial authority was then outside the country.

As the restraints of the charters upon the colonial legislatures were enforced by the English court of last resort, so it became the practice to secure their enforcement through the colonial courts[4] by declaring void whatever legislation was at variance with them. Thus in colonial days, when questions arose whether the statutes made by the assemblies were beyond their powers, the prac-

[1] Dicey, Law of the Constitution, 151
[2] Greene, Provincial America, 55
[3] Thayer, Cases on Constitutional Law, I. 150
[4] Ibid., 150

tice of the courts, if the statutes were found to be in excess, was to declare them invalid, "that is to say, in the first instance, by the colonial courts, or, if the matter was carried to England, by the Privy Council."[1]

Among the well-known cases in which this usage was followed is that of Lechmere vs. Winthrop[2], in which the petitioner was John winthrop of New London, Connecticut, grandson and name-sake of the first governor of that province. The present John Winthrop laid claim to all the real estate of his father as the heir under the common law of England. His only sister, Ann Winthrop, married Thomas Lechmere of Boston, and in 1724 her husband claimed in right of his wife, a proportionate share of this real estate. The dispute became a matter of prolonged litigation.[3]

Winthrop took his cause to England. "An Act for the settlement of Intestate Estates" had been in operation in the colony since October, 1699.[4] The charter granted by Charles II in the fourteenth year of his reign empowered the governor and assistants in Assembly "to Make, Ordain and Establish all manner of wholesome & reasonable Laws, Statutes, Ordinances, Directions, and Instructions, not Contrary to the Laws of this Realm of England."[5] Winthrop contended that the colonial law which allowed daughters to receive real estate in the distribution of the property of an intestate person was in violation of the law of England.[6] Toward the close of his long brief in the appeal to the Privy

[1] Bryce, American Commonwealth, ed. 3, I 249
[2] Talcott Papers, Conn. Hist. Soc. Coll., IV. 94; Hazeltine, Appeals from Colonial Courts. House Docs., XVII, 317
[3] Talcott Papers. Ibid., 94. 95
[4] Ibid., 95
[5] Poore, Charters. I.235
[6] Talcott Papers. Ibid., 95

Council, Winthrop says. "We, therefore, insist this law is null and void, as being contrary to the law of this realm, unreasonable, and against the tenour of their Charter, and consequently the Province had no power to make such a law and the same is void."[1] The decree of his majesty in council sustained Winthrop and annulled the law. Great anxiety was shown in Connecticut and the other colonies, for an established custom regarding intestate laws was upset in Connecticut and the intestate laws of the other colonies were threatened.[2]

The principle of disallowing laws because of their repugnance to a charter played a leading role in an event of great importance for American history. General search-warrants or Writs of Assistance were issued by Governor Shirley of Massachusetts, but largely on his own authority. When the Superior Court was asked to issue new writs in 1761, James Otis, who was in the employ of the crown, resigned his office and appeared against the king.

Interest and expectation were raised to a high point on every hand to hear the argument of Otis.[3] "Reason and the constitution," he argued, "are both against this writ; though it should be made in the very words of the petition, it would be void. An act against the constitution is void."[4] The last ground taken by Otis in commenting on the Acts of Trade, for the enforcement of

[1] Mass. Hist. Soc. Coll., Ser. 6, V, 4888. In this same appeal to the Privy Council appears the following: "Note. The laws of Connecticut are not by their Charter directed to be laid before ye Crown for their approbacon or disallowance, so that there is no other way to void any laws they shall make but by seeing if they are agreeable to ye powers of their Charter, which if they are not, then we apprehend they can not be considered as any laws at all, since a formal repeal of them can not be had otherwise than by voiding the Charter."

[2] Hazeltine, op. cit., House Docs., XVII, 319

[3] Tudor, Life of Otis, 62

[4] Adams, Works, II, 525

which the writs were issued, was their incompatibility with the charter of the colony.[1]

[1]Tudor, op. cit., 83. Talcott Papers, Ibid., 96, 97, contain a brief account of Phillips vs. Savage (1734), and Clark vs. Tousey (1745); in these cases, the laws involved were finally sustained after a long period of anxiety.

THE STATES, 1775-1789

Professor Austin Scott, in a paper before the American Historical Association, has said that a study of the principle under which the state judiciaries ignored legislative acts just prior to the adoption of the Constitution "gives a better knowledge of its rights within the national sphere. and further will show that. in the separate colonies and states, under the influence of the local spirit, quite apart from the idea of union, there grew up in a denial of legislative omnipotence the means of peaceful coercion of the States, a true instrument of nationality."[1] With this suggestive statement in mind, let us examine the cases involving the question during this period.

Holmes vs. Walton

Holmes vs. Walton is a case often referred to as the first instance[2] of a resort to the principle that a state judiciary may refuse to abide by a legislative act as being unconstitutional and hence void. It antedates all other cases.

Both houses of the New Jersey legislature, in October 1788. placed on the statute books without a dissenting vote a law authorizing trial by a jury of six men[3] in proceedings instituted to se-

[1] Amer. Hist. Asso. Papers, II, 45

[2] Amer. Hist. Rev., IV, 456. Coxe, Judicial Power and Unconstitutional Legislation, 222, gives 1786 as the date of this case.
In Robbins vs. Hardaway, Mason argued as early as 1772 against the validity of an act which provided for the sale of Indian women as slaves. but no decision was reached. See Pol. Sc. Quar., V, 235

[3] Amer. Hist. Rev.. Ibid., 463

cure the forefiture of goods brought in from the British lines. The issue was fought out before Chief Justice Brearly and his colleagues of the Supreme Court in that state. That part of the New Jersey constitution of 1776 which guaranteed the right of trial by jury[1] was held by the full bench of the court to render the law of 1778 unconstitutional.[2] The question was first raised November 11. 1779; the judges gave their opinions on September 7. 1780.

Petitions soon began to pour in upon the assembly. The frontier counties of Monmouth, Middlesex and Essex were especially prompt to protest against the proceedings of the Supreme Court. One petition was read in the Assembly on November 21, 1780 urging that the decisions in cases arising under the "seizure laws," "before a justice of the peace agreeably to the verdict of a jury may be final, and that such causes may not be removable to the Supreme Court by certiorari."[3] The sort of response with which public opinion greeted Chief Justice Brearly's decision was also strkingly indicated on the afternoon of December 8, 1780 when, in the House of Assembly. "a petition from sixty inhabitants of the county of Monmouth was presented and read, complaining that the justices of the Supreme Court have set aside some of the laws as unconstitutional, and made void the proceedings of the magistrates, though strictly agreeable to the said laws, to the encouragement of the disaffected and great loss to the loyal citizens of the state."[4] The legislature then sitting did nothing to criticise the court.

[1] Poore, Charters. II, 1313
[2] Amer. Hist. Asso. Papers, II. 46
[3] Amer. Hist. Rev., IV. 460
[4] Ibid., 459

An election was held in October, however, and the legislature which the people chose passed a law on December 22, 1780, by the terms of which a jury of twelve men must be granted on the demand of either party in such suits, and ordered the act to be printed in the GAZETTE newspaper.[1] Thus the decision was not only an expression of judicial opinion, but was one in which the legislature acquiesced.

A message from Governor Livingston to the Assembly on the 7th of June, 1782, makes the executive branch of the government an important contributor to the public opinion of that day on this question. He states that the chancellor or governor must seal a writ of replevin on the application of any citizen. but "if an act of legislation can constitutionally be made, declaring that no person in whose possession any goods, wares or merchandise shall be seized and captured as effects illegally imported from the enemy, shall be entitled to such a writ ... if such an act, I say, shall be passed it would probably encourage such seizures and give additional check to that most pernicious & detestable trade, the total suppression of which is one of the most important objects that can engage the attention of the legislature."[2]

That the decision of Chief Justice Brearly did set aside a state law is placed beyond question if we but consider the argument of counsel for Holmes during a new trial in July, 1781. He maintained that since the Holmes vs. Walton case was commenced and remained undertermined at the time of the law authorizing a trial by twelve men,[3] it did not come within the scope of this law.

[1] Amer. Hist. Rev., IV, 463
[2] Ibid., 460
[3] Dec. 22, 1780; mentioned above.

And, it was argued, as a trial by six men would be unconstitutional, no existing law covered the case.[1]

Trevett vs. Weeden

The case of Trevett vs. Weeden is one of the most famous in the history of the country and is generally regarded by historians and writers on constitutional subjects as the first case[2] of importance in which a legislative act was pronounced void because inconsistent with a state constitution. This case came on for a hearing at Newport, Rhode Island, 1786.

The exportation of gold had taken place on a prodigious scale at this time and the cry for paper money was heard throughout the land. In Rhode Island there was an economic cleavage into two well-defined sections, the one agricultural and the other mercantile. The interests of these two divisions found political expression and the state became distracted by the "hard" and "paper money" partics. The rural element was in the majority and in 1786, the paper money men consequently won a decisive victory.[3]

The members of the General Assembly became possessed of the demon of law making and there then ensued the enactment of a series of unusual laws.[4] At the June session, refusal to accept paper money in exchange for goods was made an offense and the penalty annexed was forfeiture of one hundred pounds and a disqualification to hold any office within the state. But in the August following, the legislative frenzy showed its most radical procliv-

[1] Amer. Hist. Rev., IV, 460
[2] Bryce, American Commonwealth, I, 249; Cooley, Constitutional Limitations, 161; McMaster, History of the People of the U. S. I, 337, 339
[3] Channing, The United States of America, 119
[4] Ibid., 119

ities. On the principle that "process upon the breach of penal laws should be immediate." a law was passed providing that if any person refused to accept paper bills as he would coin, should "appear before a special court within three days, and there stand trial, without a jury, according to the laws of the land."[1]

In its headlong speed, however, the legislature abruptly collided with the judiciary. In September, 1786, John Weeden, a butcher of Newport, flatly refused to receive paper money tendered him by John Trevett in payment for meat which he bought. Complaint was made to Chief Justice Paul Mulford of the Superior Court and thus the issue was thrown into the courts.

The attitude of the legislature is one striking phase of public opinion on the governmental side. This is shown by the language used in summoning the judges to appear before it and give account of their action. A resolution was passed by both houses to the effect that,

"Whereas, it appears that the honorable the judges of the Supreme Court of Judicature, at the last September term of the said court, adjudged an act of the supreme legislature of this state to be unconstitutional and so absolutely void;[2] and whereas it is

[1] Chandler, Criminal Trials. 277. In Rhode Island, the charter from Charles II remained in force until 1842; and it guaranteed the right of trial by jury in all cases. See Thayer, Cases, I. 150 and Poore, Charters, II. 1595

[2] Chandler, Ibid., 327: "The legislature has assumed a fact in their summons to the judges which was not justified or warranted by the record. The plea of the defendant in a matter of mere surplusage mentions the act of the General Assembly as unconstitutional and so void; but the judgment of the court simply is that the information is not cognizable before them. Hence it appears that the plea has been mistaken for the judgment."--Judge Howell, in a speech before the legislature in defense of the judges.

Chandler, Ibid., 337: "It is perfectly immaterial upon the present argument, whether the judgment of the court was

suggested that the said judgment is unprecedented in this state and may tend to abolish the legislative authority thereof; it is therefore voted and resolved that all the justices of said court be forthwith cited by the sheriffs of the respective counties in which they live or may be found, to give their immediate attendance upon this assembly, to assign the reason and grounds for the aforesaid judgment; and that the clerk of said court be directed to attend this assembly at the same time. with the records of the court which relate to the said judgment."[1]

The decision of the court did not meet with general approval among the voters of Rhode Island as is shown by the vote of the town of Coventry, instructing their representatives to use their influence in the general assembly, that the judges of the superior court be dealt with according to the nature of their offense. The judges "exceeded the bounds of their jurisdiction by giving their determination that the law made by the general assembly of this state was unconstitutional, when it was the duty of said court to have given their judgment. whether the said John Weeden was guilty of a breach of the law of this state or not."[2]

The judges appeared at the bar of the legislature and spoke in defense of their action. Judge Howell, the youngest member of the court, in a learned six-hour speech. declared that "for the

right or wrong; ... the only question is whether they can. in any respect, be brought to answer for it, but by due process of law."-- James M. Varnum in a speech before the legislature in defense of the judges.

The judges decided that. "Whereupon, all and singular the premises being seen and by the justices of the court aforesaid fully considered; it is considered. adjudged and declared, that the said complaint does not come under the cognizance of the justices here present and that the same be and is hereby dismissed." Pol. Sc. Quar., V, 234

[1] Pol. Sc. Quar., V, 234 [2] Chandler, Ibid., 341

reason of their judgments upon any question judicially before them, they were accountable only to God and their consciences."[1] Judge Tillinghast testified he was confident that his conduct "met the approbation of his God,"[2] and Judge Hazard remarked, "if there could have been any prepossession in my mind, it must have been in favor of the act of the general assembly; but it was not possible to resist the force of conviction."[3] The assembly decided that the reasons given by the judges were not satisfactory, and a motion was made to dismiss them from office.[4]

Before the motion came to a vote, however, a memorial by Judges Hazard, Tillinghast and Howell was sent in to the legislature. In this the judges asked for a hearing before a tribunal regularly constituted, and for an opportunity to answer to specific charges, if any could be brought against them. In this same petition, they "utterly protest against the exercise of any power in the legislature, by a summary vote, to deprive them of their aforesaid office, without the aforesaid due process of law."[5]

After the memorial had been presented, Mr. James Varnum, one of the ablest lawyers of the day and a member of the Continental Congress in 1780, addressed the House in defense of the court. He argued that the judicial arm of the government not only had the right but was duty bound to disregard unconstitutional legislation.

[1] Thayer, op. cit., I, 76
[2] Chandler, op. cit., 333
[3] Ibid., 333
[4] Ibid., 334
[5] Ibid., 334

Henry Marchant was also retained for the defendants. In 1777, he was a delegate to the Continental Congress; and when the government was organized under the constitution, Mr. Marchant was appointed by Washington a judge of the district court of Rhode Island

The legislature, he said, "have the incontrollable power of making laws not repugnant to the constitution; the judiciary have the sole power of judging of those laws, and are bound to execute them; but can not admit any act of the legislature as law, which is against the constitution."[1] As for the law passed by the Rhode Island assembly, it was "unconstitutional and void," and "this court has power to judge and determine what acts of the general assembly are agreeably to the constitution."

According to the argument of Mr. Varnum, not only may the court do this of right but it is "under the most solemn obligations to execute the laws of the land, and therefore can not, will not, consider this act as a law of the land."[2] At the conclusion of the speech, a motion was passed calling upon the attorney general for his opinion whether the legislature had the constitutional right to remove the judges of the supreme court without due process of law.[3]

William Channing, the attorney general, cast some light on the professional opinion of the time by his open declaration that he believed their judgment agreeable to law.[4] But "be their judgment agreeably to law or not,"[5] he said, ... there would be a fatal interrruption ... of government, if they could be suspended, or removed from office, for a mere matter of opinion, without a charge of criminality."

[1]Chandler, op. cit., 314
[2]Ibid., 325
[3]Ibid., 341
[4]Ibid., 343
[5]Ibid., 343. Benjamin Bourne, the first representative to Congress after the constitution was adopted, and afterwards a circuit judge of the U. S. Court, defended the positions taken by the attorney general. See Chandler, op. cit., 349

The House passed a resolution by a large majority that the judges had given no satisfactory reasons for their judgment[1], but since no charge of criminality had been preferred against them. they were allowed to leave the assembly without further attendance.

At the ensuing session,[2] their terms of office having expired. other judges were appointed.[3] The law which had given rise to this controversy was soon afterwards repealed.[4]

Commonwealth vs. Caton

Edmund Randolph, another delegate to the Federal Convention, was a prominent figure in judicial proceedings involving the principle of declaring laws unconstitutional. The legislature of Virginia passed a law in 1776 which took from the executive the power of pardon and conferred it on the House of Delegates. The lower chamber of the legislature exercised its newly acquired function to free a certain Caton. who had been convicted of treason. When Attorney General Randolph moved for execution upon the prisoner. the latter pleaded the pardon of the House. Under the constitution as it then was. the case was referred to the court of appeals because of the new and difficult points involved.

The arguments in the case could hardly have been otherwise than lively. and must have been given with much feeling, as they drew from Justice Wythe. the ultimatum: "If the whole legislature. an event to be deprecated, should attempt to overleap the bounds

[1] Chandler, op. cit.. 349
[2] Ibid., 349
[3] Baldwin, American Judiciary. 110
[4] Elliot's Debates, V. 322: "In Rhode Island, the Judges who refused to execute an unconstitutional law were displaced; and others substituted. by the legislature. who would be the willing instruments of the wicked & arbitrary plans of their masters." -- Madison
George Wythe and John Blair, whose names appear on the roll

prescribed to them by the people. I. in administering the public justice of the country. will meet the united powers at my seat in this tribunal: and. pointing to the constitution, will say to them. here is the limit of your authority. and hither shall you go. but no further."[1] The issue thus raised was not decided.[2]

President Pendleton felt the reach of this principle, and realized that it was fundamental one. He declared that the question how far "this court ... shall have power to declare the nullity of a law passed in its forms by the legislative power. ... is indeed a deep. important. and I will add, tremendous question. the decision of which involves consequences to which gentlemen may not have extended their ideas."[3] He was happy in the hope that the legislature would remove "the disagreeable necessity of ever deciding it."[4]

The report of the case also says: "Chancellor Blair and the rest of the judges, were of the opinion, that the court had power to declare any resolution or act of the legislature or or either branch of it. to be unconstitutional and void."[5]

The attorney-general argued in the Court of Appeals that whether the act was contrary to the spirit of the constitution or not, "the court was not authorized to declare it void."[6]

of the Federal Convention. sat as judges in this case.

[1] 4 Call (Va.), 8

[2] Willoughby. The Supreme Court. 30. A remonstrance was sent to the Virginia legislature.

[3] 4 Call (Va.). 17

[4] Ibid., 17

[5] Ibid., 20

[6] Ibid., 7. J. B. Cutting, in a letter to Thomas Jefferson. speaks of the "manly proceeding of a Virginia court of appeals. Without knowing the particular merits of the cause. I may venture to applaud the integrity of judges who thus fulfil their oaths and their duties. I am proud of such characters. They exalt themselves and their country, while they maintain the

Rutgers vs. Waddington

The celebrated case of Rutgers vs. Waddington was an occasion for the expression of well-defined views indicating the attitude of the legislature, party organizations and the citizens of New York. The issue in this litigation was decided by the Mayor's Court of New York City in June 1784, James Duane presiding.

In its decision, the municipal court refused to take into account what it considered to be the unconstitutional portions of the Trespass Act. By the provisions of this law, Whigs, at the termination of the war, were allowed to recover rent from the Tories for any houses they may have occupied while the British were in possession of the city.[1]

The popular branch of the legislature passed a resolution condemning the action of the court. "The judgment," it was declared "is, in its tendency, subversive of all law and good order and leads directly to anarchy and confusion." The legislature also believed that acquiesence in the decision would involve dangerous consequences, for "if a court instituted for the benefit and government of a corporation may take upon themselves to dispense with a law of the state, all other courts may do the like; and therewith will end all our dear bought rights and privileges, and legislatures become useless."[2]

The decision created a great deal of excitement and aroused the resentment of the "violent Whigs," the party of which Clinton

principles of the constitution of Virginia and manifest the unspotted probity of its judiciary department." Bancroft. History of the Constitution, II, App., 473

[1] Memoirs of Aaron Burr. II, 44

[2] Ibid., 47

was the leader.[1] The popular feeling became so great that a mass meeting of the Whigs was held on the 13th of September, 1784. As a result of the meeting, a committee was appointed which prepared and published an address to the people of the state.

In the opinion of the committee, the proceeding of the court was "an assumption of power in that court, which is inconsistent with the liberties of the people."[2] It was declared that to invest the courts with the power of controlling the legislature would be absurd. The function of the courts of justice "from the very nature of their institution, is to declare laws, not to alter them."[3]

The legislature recommended that such persons be appointed mayor and recorder of the City of New York "as will govern themselves by the known laws of the land."[3]

The case was probably not of as great importance as the demonstrations of public disapproval at the time would seem to indicate, for Alexander Hamilton in referring to it says that "the suit of Rutgers vs. Waddington, after a partial success in the Mayor's Court, was terminated by a compromise ... owing to the apprehension of an unfavorable issue in the supreme court; and this, notwithstanding the defendant was a British subject."[4]

Bayard vs. Singleton

Whether the courts of North Carolina should enforce a law which they deemed unconstitutional was a question carefully considered in 1787.[5] The court was thrown into doubt and considered the task of deciding between the legislative and judicial powers.

[1] Davis, Memoirs of Aaron Burr, II, 45
[2] Ibid., 45
[3] Davis, Ibid., 47
[4] Hamilton's Works (Hamilton), V, 115, 116; VII, 199
[5] Pol. Sc. Quar., V, 238

After long and careful deliberation the court decided that the constitution must remain in force "as the fundamental law of the land."[1] and that the legislative act "must ... stand as abrogated and without any effect."[2] It seemed clear that no act passed by the legislature "could by any means repeal or alter the constitution." They felt that if this were possible. the government established by the constitution would be dissolved.

The stand of the court. however. was not universally accepted at that time. Justice Spaight[3] stated the point of view of those in opposition very forcibly when he said: "I do not pretend to vindicate the law which has been the subject of controversy; it is immaterial what law they have declared void; it is their usurpation of the authority to do it. that I complain of. as I do most positively deny that they have any such power; nor can they find anything in the constitution either directly or impliedly. that will support them or give them any color or right to exercise that authority. Besides it would have been absurd. and contrary to the practice of all the world. had the constitution vested such power in them, as they would have operated as an absolute negative on the proceedings of the legislature. which no judiciary ought ever to possess. and the state. instead of being governed by the representatives in the general assembly would be subject to the will of three individuals. who united in their own persons the legislative and judiciary powers. which no monarch in Europe enjoys. and which would be more despotic than the Roman decemvirate. and equal-

[1] Pol. Sc. Quar., V. 238
[2] Haines. op. cit., 31
[3] McRee. Life and Correspondence of James Iredell. II. 169

ly insufferable." In this letter, which is dated August 12th, 1787, it is stated that the Assembly, in more instances than one, passed laws militating against the constitution, and of a more dangerous nature "than the one which the judges, by their own authority, thought proper to set aside and declare void."[1]

The great argument, as set forth by Mr. Iredell in an address was "that though the Assembly have not a right to violate the constitution, yet if they in fact do so, the only remedy is, either by a humble petition that the law may be repealed, or a universal resistance of the people."[2] But, as was answered at the time, to petition in this manner would be asking the legislators to be graciously pleased not to be their tyrants.

James Iredell, who was one of the counsel in the case and a member of the Philadelphia convention, was in favor of the exercise of this power. In a letter to James Spaight[3] on August 26th, 1787, he argues that since the constitution is a fundamental law, either it must be obeyed, "by the rejection of an act unwarranted by and inconsistent with it, or you must obey an act founded on an authority not given by the people, and to which, therefore, the people owe no obedience." Most of the lawyers, he believed, were of his opinion.[4]

Although Justice Iredell was confident that "if any act of Congress or of the legislature of a state violates those constitutional provisions, it is unquestionably void," yet he admitted that, "as the authority to declare it void is of a delicate and awful nature, the court will never resort to that authority but in a

[1] McRee, op. cit., 169
[2] Ibid., 147
[3] Ibid., 172
[4] Ibid., 176

clear and urgent case."[1] A court cannot pronounce a law void merely because it is contrary to the principles of justice.

Justice Iredell was pursuaded that this power had all the force of duty. "We felt," he says, "in all its rigor the mischiefs of an absolute and unbounded authority, claimed by so weak a creature as man, and should have been guilty of the basest breach of trust, as well as the grossest folly, if in the same moment when we spurned the insolent depotism of Great Britain, we had established a despotic power ourselves."[2]

According to one authority, the Federal Convention was influenced by news which it received of the decision in this case when it adopted its resolution of July 17.[3]

Case of the Judges

Six years after Commonwealth vs. Caton, Virginia was again agitated over the question of determining the constitutionality of a law when the famous "Case of the Judges"[4] came to a hearing in the state courts. An act of the assembly was passed establishing district courts in January, 1788. The constitutionality of a previous law "had been occasionally discussed by statesmen and others," but after the passage of the district court law, "the question was more frequently agitated, and different views taken by those who opposed, and by those who favored, the act."[5] The court sent a remonstrance to the governor with a request that he lay it before the general assembly.[6]

[1] Pol. Sc. Quar., V, 244
[2] McRee, Ibid., 146
[3] Coxe. op. cit., 223
[4] 4 Call (Va.), 135
[5] Ibid., 139
[6] Ibid., 141

In its communication to the governor, the judges expressed their regret at being obliged "to pass upon the constitutionality of a law." They declared that the alternative was either to decide the question or resign their offices, and that the question was not considered until this dilemma was presented. The latter would have been their choice but "finding themselves called by their country to sustain an important position as one of the pillars on which the great fabric of the government was erected, they judged that a resignation would subject them to the reproach of deserting their station and betraying the sacred interests of society entrusted with them."[1]

In the report of the case, the decision of the judges is shown to be "that the constitution and the acts are in opposition, that they can not exist together; and that the former must control the operation of the latter."[2] The court also maintains that if this opinion, declaring the supremacy of the constitution, needs any precedents to support it, they "may be found in the opinion of the legislature themselves, who have, in several instances, considered the constitution as prescribing limits to their powers, as well as to those of the other departments of government."

Opinion in Massachusetts

Public opinion on the judicial power of annuling a law seems to have crystallized early in Massachusetts. An exchange of letters between Mr. Justice Cushing and John Adams gives an interesting sidelight on the subject.[3]

In his letter of reply, Mr. Adams says, "You have my hearty

[1] 4 Call (Va.), 142
[2] Ibid., 142
[3] Adams, Life and Work of John Adams, IX, 390

concurrence in telling the jury the nullity of acts of parliament, ... I am determined to die of that opinion let the ius gladii say what it will."

It has been inferred that this was the prevailing opinion when in 1779 Massachusetts formed her constitution.[1] The fundamental law was particularly emphatic in the wording by which it established the separate and independent character of the three departments of government.[2] If this preconceived notion concerning the functions of the courts existed, the duty of enforcing the provisions of the constitution in cases between individuals would of necessity have devolved upon the judiciary. This seems to have been the intent of the men who drafted the constitution.[3]

The separation of the three departments of government in such precise terms occurs in the Bill of Rights which, it would seem, was an attempt to place the dogma on higher grounds even than the constitution. But Massachusetts without doubt also conferred this power on the courts by statute. A law was passed in 1786 repealing all legislation at variance with the treaty of Great Britain.[4] The Massachusetts act provided that "the courts of law and equity within this commonwealth be, and they are hereby, directed and required in all cases and questions coming before them respectively and arising from or touching the said treaty, to decide and adjudge according to the tenor, true intent and meaning of the same, anything in the said acts or parts of acts to the contrary thereof in anywise notwithstanding."[5]

[1] Pol. Sc. Quar., V. 232
[2] Poore, Charters, I, 960
[3] Pol. Sc. Quar., Ibid., 232
[4] Ibid., 238, 239
[5] Ibid., 238, 239

It was about this time that the Supreme Judicial Court of Massachusetts, when the legislature ignored a fundamental law of the state, "solemnly determined that the particular statute was unconstitutional."[1] The legislature, however, displayed no feeling.[2] At its next session,[3] the law was unanimously repealed.[4]

It is probable that Elbridge Gerry had this instance in mind when in the general convention at Philadelphia, he said that "the judges had actually set aside laws as being against the constitution. This was done too with general approbation."[5]

Report of John Jay

One of the most important documents penned during the confederation period was a report to the Continental Congress by John Jay,[6] secretary for the department of foreign affairs. It seems not to have been cited by writers on the subject of the powerful weapon which the Supreme Court now wields, but a reading of the document compels one to conclude that the great secretary was arguing for the investiture of the state courts with power to disallow state laws.

The report as prepared by Jay, after exhibiting the grievances that had been recited by Great Britain in papers to John Adams, the American ambassador, states that certain questions presented themselves. One of these was whether by acts of its own internal legislature, any individual state has a right "to explain and decide the sense and meaning in which any particular article

[1] Cutting to Jefferson, Bancroft, op. cit., II, App., 473
[2] Ibid., 473
[3] Baldwin, American Judiciary, 110
[4] Bancroft, Ibid., 473
[5] Farrand, The Records of the Federal Convention, I, 97
[6] Secret Journals of Congress, IV, 185

of a national treaty shall be received and understood within the limits of that state?"[1] In case doubts arise about the meaning of state laws, state legislatures may remove those doubts by "explanatory and declaratory acts," but when doubts arise regarding the meaning of a treaty, even "Congress itself have no authority to settle and determine them."[2] Only the parties to the treaty have the right by mutual consent to place a construction on a treaty.

But in cases between private individuals the procedure is of course different. All doubts then are "in the first instance mere judicial questions; and are to be heard and decided in the courts of justice having cognizance of the causes in which they arise."[3] The "rules and maxims established by the laws of nations for the interpretation of treaties" govern the courts in their determinations under this head.

Since the states are without power, What is to be done? The report contains three resolutions for Congress to enact into law. The first resolution is in substance that the legislatures of the several states shall not pass any act to explain a national treaty. By the terms of the second resolution, any acts existing, repugnant to the treaty of peace, shall be repealed. But the third resolution[4] which Congress is called upon to pass is the most interesting of all. The states are to make the above-mentioned repeal "rather by describing than reciting the said acts." To do this.

an act is to be passed, declaring "in general terms" that the acts repugnant to the treaty are repealed, and that the "courts of law

[1] Secret Journals, op. cit., 203
[2] Ibid., 204
[3] Ibid., 205
[4] Ibid., 283

and equity in all causes and questions cognizable by them respectively, and arising from or touching the said treaty, shall decide and adjudge according to the true intent and meaning of the same, anything in the said acts or parts of acts to the contrary thereof in anywise notwithstanding."[1] The effect of a repeal in general terms would be to turn the whole business over "to its proper department," the judicial; and the "courts of law will find no difficulty in deciding whether any particular act or clause is or is not repugnant to the treaty."[2]

On March 31, 1787, Congress unanimously agreed to the resolutions in the form recommended by the secretary of foreign affairs.[3]

[1] Sec. Jour., op. cit., 283
[2] Ibid., 283
[3] Ibid., 295

THE RECORDS OF THE FEDERAL CONVENTION AND THE SOURCES BEARING ON THEM

In rearing a new structure on the ruins of the Confederation, license and anarchy were abandoned in favor of liberty and unity. The members of the general convention at Philadelphia and students of government in general saw that in doing this, the power to pronounce upon the constitutionality of laws must exist somewhere within the new system.[1] Only on this principle could any sort of stability in our foreign relations be secured.[2] And within this political system, moreover, a vigorous national government and harmonious relations in the region of the states and among the people were the sine qua non.[3] An efficacious plan, then, "for the peaceable decision of all controversies arising within itself," was indispensable.

The new government might be either confederate or national. But to expect voluntary acquiescence among so many independent states "was a calculation forbidden by a knowledge of human nature, and especially so by the experience of the confederation."[4] As Alexander Hamilton pointed out in The Federalist, such an arrangement would be a hydra in government. The central authority must be the deciding factor.

The force of this came home even to the "small state" men; it remained only to choose the mode.[5] This could be either pre-

[1] Address of Gouverneur Morris to Pa. legislature. Sparks. Life of Gouverneur Morris, III, 438

[2] Farrand, Records of the Federal Convention, I, 238; Ibid., 316

[3] Ibid., 238; Madison to Rives. Ibid., III, App. A. CCCXCI. 523; Madison on Nullification, Ibid., CCCXCVIII. 537

[4] Madison to Tyler, Ibid., CCCXCII. 527; Madison on Nullification, Ibid., 537

[5] Madison to Trist, Ibid., CCCLXXXVIII, 516; Madison to

ventive or corrective.[1] so far as the abrogation of state laws was involved. As for a preventive remedy. a negative or veto on state laws could be provided. The other principle might be embodied in the form of a legislative repeal, judicial intervention, or by an "administrative arrest of them."[2] It was in the deliberations over these and other minor possibilities that one of the most striking features of our constitution was wrought out.

The States as Arbiters

That the states should be the umpire in stopping the operation of unconstitutional laws is a notion some traces of which may be found in the debates of the convention and the writings of the delegates. It is a novel fact that one of the four leading plans debated by members of the convention proposed to confide this power in the state executives. Hamilton's proposal. which was submitted on June 18th. contained a preventive measure which contemplated the appointment of the executive officer of each state by the central government.[3] By this arrangement, state laws of an unconstitutional nature would be dealt with. In carrying out the plan, each state executive was to exercise a negative on the laws of his state.[4] Mr. Langdon aptly observed that from this point of view the question was whether the general or the state governments were to judge the scope of the constitution[5] and Mr. Pinckney. who moved and later withdrew a motion for this scheme, declared that state executives should be

Tyler, Ibid.. 527; Farrand. II, 75; Ibid., III. CCCXCI, 523;

[1] Madison to Tyler, Ibid.. 527

[2] Madison to Trist, Ibid., 516; Madison to Tyler, Ibid.. 527

[3] Farrand, I, 293; Pickering to Hamilton, Ibid., III. CCXCVI. 399.

[4] Ibid., I. 293

[5] Ibid.. II. 391

given this power and "that it would be so provided if another convention should take place."[1]

As a repository of the power to intercept unconstitutional legislation, whether local or national, the legislative department occasioned but slight discussion. To grant the power to state judiciaries, moreover, except as courts of the first instance, seems also to have been considered inadmissible.[2] "Confidence," said Madison, "can not be put in the State Tribunals as guardians of the National authority and interests;"[3] in all of the states, the courts were more or less dependent on the legislatures. In Georgia, they were appointed annually by the legislature and in Rhode Island, "the judges who refused to execute an unconstitutional law were displaced," continued Madison; "and others substituted by the Legislature, who would be the willing instruments of the wicked & arbitrary plans of their masters."[4]

Coercion

Hamilton had remained a silent member of the convention until his notable speech of June 18 when he made known what he regarded as the principles on which the government must of necessity be founded. Force was named as one of these, "by which may be understood a coertion of laws or coertion of arms."[5] Which one should it be?

All three of the plans before the convention involved some form of coercion by arms. Some of the delegates, however, did not regard the proposals in that light. Mr. Wilson, while con-

[1] Ibid., II, 391
[2] Ibid., I, 120
[3] Ibid., II, 27
[4] Ibid., II, 28
[5] Ibid., III, CLXIII, 241; Ibid., I, 284

trasting the Virginia and New Jersey plans implies in his remarks that the former did not rest on the coercive principle.[1] On another occasion, Luther Martin of Maryland is sponsor for the statement that the "federal plan of Mr. Paterson does not require coercion more than the national one,"[2] and on still another day Mr. Bedford truly says, "after all, if a State does not obey the law of the new System, must not force be resorted to as the only ultimate remedy, in this as in any other system."[3] Since government, of necessity and from its very nature. contains this ingredient, the real aim was to reduce its proportions in the scheme. and if possible make it unnecessary.[4] This the new constitution meant to do.[5]

Force, while it might serve as an ultimate resort, could not be the usual method of enforcing the laws in the affairs of every day life, except in a government based on fiction. The use of force "against the unconstitutional proceedings of the States would prove as visionary & fallacious as the Govt. of Congs."[6] A union on such a basis "seemed to provide for its own destruction."[7] Even if not flimsy, it would be unjust.[8] To "attempt the execution of the laws of the Union by sending an armed force against a delinquent state would involve the good and bad. the innocent and guilty in the same calamity."[9] War would ensue, and not punishment. No less demoralizing was its effect on those using it. As viewed through the eyes of Mr. Randolph. "it tend-

[1] Farrand, I. 252
[2] Ibid., 341
[3] Ibid., 167; Ibid.. III, 241
[4] Ibid., I. 54
[5] Madison to Jefferson, Ibid.. CXXXV, 131
[6] Ibid., I, 164; Ibid., 255
[7] Ellsworth in Connecticut Convention, III, CLXIII, 241
[8] Ibid., I, 54; Ibid.. 255; Ibid.. 284, 285; Ellsworth, The Landholder, Ibid., III. CLXXXIX. 272
[9] Ibid.. III, CLXIII, 241

ed also, to habituate the instruments of it to shed the blood and riot in the spoils of their fellow Citizens, and consequently trained them up for the service of Ambition."[1] Thus, we see, the principle was wrong in theory and impossible in practice.

Legislative Negative

Fiction again raised its head in the Federal Convention when it was assumed there could be a law contravening the Constitution, which was itself law. This is the theory which underlay the legislative negative, the direct opposite of which vitalizes the existing political system.

The legislative negative was "extensively favored, at the outset."[2] George Mason, in a letter to his son, as early as May 20, wrote that "the most prevalent idea in the principal States seems to be a total alteration of the present federal system and substituting a great national council or parliament and to make the several State legislatures subordinate to the nation, by giving the latter the power of a negative upon all such laws as they shall judge contrary to the interests of the federal Union."[3] Writing again on Junel, Mason said the idea was "still the prevalent one."[4]

The career of this scheme in the convention, from the standpoint of its essential nature, exhibits several curious phases. Very early in its sittings, on May 31, without debate and without a dissenting vote, provision was made to declare void "all State laws contravening in the opinion of the Nat Leg the articles of

[1] Farrand, I, 255
[2] Madison to Tyler, III, CCCLXXXIII, 516
[3] Mason to Mason, III, XV, 23
[4] Mason to Mason, III, XXXII, 32

the Union."[1] This was the plan in its mildest form.

It remained for Pinckney to run the whole gamut of legislative powers. On June 8, he moved to amend the original form, giving to the legislature the right "to negative all laws passed by the several States contravening, in the opinion of the national legislature," etc.[2] Thus the scope of the plan was enlarged to include all laws, whether unconstitutional or not, and in this shape it found a warm advocate in Madison, for he "could not but regard an indefinite power to negative legislative acts of the States as absolutely necessary to a perfect System."[3] The convention, however, did not acquiesce in it.[4]

The summer wore on and finally, as late as August 23, the convention was again considering the plan.[5] This renewal of it involved one change, the requirement of two-thirds rather than a majority of each branch of the legislature. When John Quincy Adams was preparing the debates of the convention for publication in 1818, he received from Mr. Pinckney a copy of the constitution he had proposed in the convention. In the accompanying letter, Pinckney says, "soon after the Convention met I changed & avowed candidly the change of my opinion on giving the power to Congress to revise the State Laws in certain cases...thinking it safer to refuse (it) altogether."[6] In a letter penned by Mr. Madison on June 27, 1831, he classes this statement as "among the instances in which the memory of Mr. Pinckney failed him." The name of the mover is not on record in the journal, "but satis-

[1] Farrand, I, 54
[2] Ibid., 162
[3] Madison, Writings (Hunt's ed.), III, 121
[4] Farrand, I, 162
[5] Madison to Sparks, Ibid., III, CCCLXXXIV, 503
[6] Pinckney to Adams, Ibid., CCCXXVI, 427

factory information exists that it was Mr. Pinckney."[1] Thus we have another stage in the progress of the legislative negative during the convention.

The "accomodating proposition to the small states" was made by Edmund Randolph on July 10 and in this we may observe the relation which discussions of the legislative negative had to the present constitutional plan.[2] The fourth resolution provided that any state might appeal to the national judiciary against a negative, which, if found unconstitutional, would be void. A citizen, moreover, in accordance with the fifth resolution, "conceiving himself injured or oppressed by the partiality or injustice of a law of any particular state, may resort to the National Judiciary, who may judge such law to be void." This would seem to be evidence of an advance in the direction of judicial non-concurrence in unconstitutional legislation.

The legislative negative was doubless suggested by an acquaintance with the English constitution. Madison, himself, is authority for the statement that it came from "the negative in the head of the British Empire, which prevents collisions between the parts & the whole, and between the parts themselves."[3] The legislative negative was made "a special charge against Madison by "Mutius" who took Madison to task for several things done by the convention, using Yates' notes as the basis for his criticism. Madison, discussing the charges in October 1833, asked if it was to be wondered at "that among the early thoughts on a subject so complicated and full of difficulty, one should be turned to a pro-

[1] Madison to Sparks, Farrand, III, App. A. CCCLXXXIV, 503
[2] Ibid., LXI, 57
[3] Madison, Preface to Debates in the Convention of 1787. Ibid., CCCI, 539

vision in the compound and on this point analogous system of which this Country had made a part."[1] The king wielded irresponsible power which "had rendered the provision justly odius," but under the American system, it would be carried out by an elective authority. Madison believed that its usefulness had been clearly demonstrated in England, for "nothing could maintain the harmony and subordination of the various parts of the empire, but the prerogative by which the crown stifles in the birth every Act of every part tending to discord or encroachment."[2]

Could the idea be reduced to practice? Some kind of machinery was necessary to render it useful and we may note four interesting suggestions under this head. Objection had been made on the ground that all of the laws would have to be sent up to the general legislature; but in a speech on July 17, Madison showed that this could be avoided "by some emanation of the power into the states, so far at least as to give a temporary effect to laws of immediate necessity."[3] Aside from an introduction of the states into the administration of the scheme, the central government was considered as the proper source of motive power for this expedient. One way of ending the contradictions between general and local laws was a proposal "de nommer un Committee des deux Chambers, charge de'examiner toutes les loix des Etats individuels et de rejeter toutes celles qui seront contraires aux maximes et aux vues du Congres."[4] It was also proposed to assign this function

[1] Madison to Rives. Farrand, op. cit., III. App. A, CCCXCI. 523

[2] Ibid., II, 28 [3] Ibid., 28

[4] Mr. Otto au Comte de Montmorin. Ibid., III. App. A, XLI, 41

to one branch only of the legislature; it was thought the negative in this form would have even more friends than it had otherwise. for the upper house was to rest directly on the states. Then, too. the lower house might be too numerous to sit constantly.[1] The judiciary, moreover. was also considered as a means of carrying the legislative negative into execution. The accomodating proposition to the small states, as we have seen. contained the proviso that "any state may appeal to the national Judiciary against a negative," which, if adjudged unconstitutional. "shall be void."[2] As we see, the machinery for carrying out the measure was to be either the states, the federal senate, congress or the national judiciary.

The principal objections to the proposed legislative negative in the sphere of its practical working were found in the extent of the country. the number of the states. and the multiplicity of their laws.[3] It was seen that as time went on these objections would have greater weight.

"Are the laws of the States to be suspended in the most urgent cases." demanded Mr. Bedford in the convention. "until they can be sent seven or eight hundred miles, and undergo the deliberations of a body who may be capable of Judging of them?"[4] He wondered if the legislature would be in session continuously for the purpose of judging the laws as they came up from the states.

In committee of the whole, Mr. Mason inquired, "Is no road

[1] Madison to Tyler, Farrand, op. cit.. III. CCCXCII, 527; Madison to Rives. Ibid., CCCXCI, 523; Ibid.. I, 168

[2] Ibid.. III, LXI. 57

[3] Madison, Preface, etc.. op. cit., Farrand, III. CCCI. 539; Madison to Rives, Ibid.. CCCXCI. 523; Madison to Trist. Ibid.. CCCLXXXVIII, 516; Madison to Tyler. Ibid., CCCXCII, 527.

[4] Ibid., I, 167

nor bridge to be established without the Sanction of the General Legislature? Is this to sit constantly in order to receive & revise the State Laws?"[1] It was not his intention, however, to condemn the idea.

Aside from these objections, the competency of congress was also questioned in this connection. "Will a gentleman from Georgia," asked Mr. Lansing, "be a Judge on the expediency of a law which is to operate in N. Hampshire. Such a Negative would be more injurious than that of Great Britain heretofore was."[2]

Opposition to the principle on more general grounds also developed. Mr. Butler was "vehement agst. the negative," "as cutting off all hope of equal justice to the distant States."[3] It was meant, Mr. Bedford found, "to strip the small States of their equal right of suffrage."[4] This statement was made on June 8, and Mr. Martin, who spoke upwards of three hours on June 27, declared that "the states, particularly the smaller, would never allow a negative to be exercised over their laws."[5] From the standpoint of the states, the proposal appears to have been regarded an an instrument in the hands of the large state men, at least until equality in the senate was established.[6]

Gouveneur Morris opposed the power as unnecessary, "if sufficient Legislative authority should be given to the Genl. government." Mr. Sherman, moreover, was of similiar opinion, "the laws of the General Government being Supreme & paramount to the State laws according to the plan, as it now stands."[7] To Mr. Gerry,

[1] Farrand, op. cit., II, 390
[2] Ibid., I, 336
[3] Ibid., 168
[4] Ibid., 167
[5] Ibid., 438
[6] Ibid., I, 412; II, 390
[7] Ibid., II, 390

the legislative negative was "a leap in the dark," and he believed the powers to which it extended ought to be defined.[1]

On the great underlying principle involved, however, Mr. Sherman made what was perhaps the most significant comment of all, when on August 23, in committee of the whole, he affirmed that "such a power involves a wrong principle, to wit, that a law of a State contrary to the articles of the Union, would if not negatived, be valid & operative."[2]

Enthusiasm was somewhat weakened by the belief that the political system about to be raised would provide for judicial disallowance of unconstitutional laws. Mr. Sherman thought it unnecessary, "as the Courts of the States would not consider as valid any law contravening the Authority of the Union, and which the legislature would wish to be negatived."[3] Gouverneur Morris also became more and more opposed to the negative because "a law that ought to be negatived will be set aside in the Judiciary department," and with another method in mind, he added, "if that security should fail, may be repealed by a national law."[4]

Support of the legislative negative was both negative and positive. It constituted a protection against certain dangers and was likely to impart desirable qualities to the legislation. Dangers were apprehended from the variant constructions that would be made by different interests, and even if partiality were not shown, dangers would arise from "ambiguity in ... judgment."[5] James Monroe, moreover, pointed out the great positive virtue when he

[1]Farrand, op. cit., I, 412 [2]Ell. Deb., V, 322
[3]Farrand, Ibid., II, 27 [4]Ibid., 28
[5]Madison to Jefferson, Ibid., II, App. A, CXXXV, 131

said. "it will. if the body is well organized, be the best way of introducing uniformity in their proceedings that can be devis'd."[1]

Early in the convention, as we have seen, it became the settled purpose of the delegates to employ the legislative negative in the government about to be organized. Leaders in the debates looked upon it as indispensible and its necessity was frequently dwelt upon.[2] Writing in 1833, Madison declares, "the necessity of it appears to have been taken for granted."[3] Subordination of the states was essential and this method was referred to as the only one by which the states could be prevented from "disturbing ye order & harmony of ye whole, & ye governmt. render'd properly national, & one."[4] The necessity of "some adequate mode of preventing the states in their individual characters,from defeating the constitutional authority of the states in their united character, and from collisions among themselves, had been decided by a past experience."[5] Madison, on July 17, said "the necessity of the general Govt. proceeds from the propensity of the States to pursue their particular interests, in opposition to the general interest."[6] In short, "to recur to the illustration borrowed from the planetary system, this prerogative of the General Govt. is the great pervading principle that must control the centrifugal tendency of the states; which, without, will continually fly out of their proper orbits and destroy the order and harmony of the political system."[7] Mr. Wilson considered this "the key-stone wanted to

[1]Monroe to Jefferson, Farrand, op. cit., App. A, III, LXXIV, 65
[2]Ibid., II, 390; Ell. Deb., V, 322; Farrand, I, 164
[3]Madison to Rives, Farrand, III, CCCXCI, 523
[4]Ibid., XCI, 73 [5]Madison to Rives, Ibid., CCCXCI, 523; Madison to Jefferson, Ibid., CXXXV, 131
[6]Ibid., II 27; Madison to Jefferson, Ibid., CXXXV, 131; Ibid., II, 391 [7]Ibid., I, 164

compleat the wide arch of Government we are raising."[1]

Negation by the legislature, as already noted, was opposed because other expedients, especially the national judiciary, seemed more worthy of adoption. For the contrary reason, it was favored. Madison considered it "the mildest expedient that could be devised for preventing these mischiefs," for if no such precaution be adopted, "the only remedy would lie in an appeal to coercion."[2] Not only coercion, but legislative repeal, was opposed from this standpoint. The states could "pass laws," declared Madison on July 17, "which will accomplish their injurious objects before they can be repealed by the Genl. Legistre.," and then added, "or set aside by the National Tribunals."[3] Thus we also find the negative preferred above the judiciary. Correspondence written in 1787 and remarks made by Wilson in the convendisclose the feeling that it would be more convenient "to prevent the passage of a law than to declare it void after it is passed ... that a State which would violate the Legislative rights of the Union, would not be very ready to obey a judicial decree in support of them."[4] To prevent the passage of a law rather than declare it void afterwards, was held to be the wiser course, particularly "where the law aggrieves individuals, who may be unable to support an appeal agst. a State to the supreme Judiciary."[5] Col. Taylor also embraced the legislative negative because he "regarded the control of the Fedl. Judiciary over the State laws as more objectionable than a legislative negative on them."[6] Madi-

[1] Farrand, op. cit., II, 391 [2] Ibid., I, 164
[3] Ibid., II, 27
[4] Madison to Jefferson, Ibid., III, App. A, CXXXV, 399; Ibid., II, 391
[5] Madison to Jefferson, Ibid., 399
[6] Madison to Rives, Ibid., III, App. A, CCCXCI, 524

son's rejoinder to the statement that the courts might disregard an unconstitutional law was that "nothing has yet been offered to invalidate the doctrine that the meaning of the Constitution may as well be ascertained by the legislature as by the judicial authority."[1] All of these quotations go to show that the national judiciary was frequently in the minds of the delegates while the legislative negative was under discussion.

The Virginia and Pinckney plans, be it noted, embodied the principle of a legislative negative on state laws, and early in its proceedings, the convention adopted it in committee of the whole. In common with coercion of arms, however, it was given up. Such a power, as Sherman indicated, involved a wrong principle.

Council of Revision

A belief was current at the time of the convention that the liberty of the people was in great danger from legislative usurpation and although the proposition had once failed before, Madison, Wilson, Ellsworth and Mason all spoke in favor of a council of revision as a means of guarding against this tendency.[2] But even then it was thought the legislature would not have a foeman worthy of its steel. Experience under the articles of Confederation was solemnly pointed to as having "evinced a powerful tendency in the Legislature to absorb all power into its vortex." The lesson was plain; every expedient, in keeping with the republican form of government should be lodged with the other departments as an offset to the legislature.

[1] Ell. Deb., IV, Madison in House of Representatives(1789). 399

[2] Madison, Writings. (Lodge's ed). 25; Mason to Mason, Farrand, op. cit.. III, App. A. XV. 23; Ibid., II, 73; Ibid., 75

Defense of the executive, however, was not the only reason for a council of revision. Through their function as expositors, said Col. Mason, the judges "could impede in one case only, the operation of laws. They could declare an unconstitutional law void."[1] As for any other law, "however unjust oppressive or pernicious," if it was not at the same time unconstitutional, the judges would have no alternative but to accept it.[2] "Laws may be unjust," said Mr. Wilson, "may be unwise, may be dangerous, may be destructive, and yet may not be so unconstitutional as to justify the Judges in refusing to give them effect."[3] The judiciary should be allowed to aid in forestalling laws of this kind.

Advocates of the council of revision associated many advantages with the scheme. As already indicated, Mr. Wilson urged that it was not sufficient that the judges "as expositors of the Laws would have an opportunity of defending their constitutional rights."[4] To be able to defend its constitutional rights, however, was one advantage to the judiciary. And Madison, on July 21, in enumerating the advantages of an executive council, said it would give to the judiciary, "an additional opportunity,"[5] with which to combat legislative encroachments. It would, moreover, be advantageous to the executive by "inspiring additional confidence & firmness;" it would redound to the service of the legislature "by the valuable assistance it would give in preserving a consistency, conciseness, perspicuity, & technical propriety in the laws;" and it would be a blessing to the people at large, "as an additional check agst. a pursuit of those unwise & unjust measures which

[1] Farrand, op. cit., II, 74
[2] Ibid., 78; Ibid., 73
[3] Ibid., 73
[4] Ibid., 73
[5] Ibid., 74

constituted so great a portion of our calamities."[1] Mr. Ellsworth also concurred in these sentiments and added that where the law of nations might be involved, the judges would be the only ones having adequate knowledge.[2]

A large part of the opposition to the council of revision was based on the assumption that the judiciary would have a negative on state and congressional laws. Mr. Gerry thought the judiciary would have "a sufficient check agst encroachments on their own department by their exposition of the laws, which involved a power of deciding on their constitutionality. In some States the Judges had actually set aside laws as being against the constitution. This was done too with general approbation."[3] Mr. King was no less explicit in an observation made by him on June 4. "The judicial," he said, "ought not to join in the negative of a law, because the Judges will have the expounding of those laws when they come before them; and they will no doubt stop the operation of such as shall appear repugnant to the Constitution."[4] Two days later, Mr. Madison conceived there was weight in the objection "that the Judges ought not to be subject to the bias which a participation in the making of laws might give in the exposition of them."[5] The motion was open to strong objections. for "it was making the expositors of the Laws, the Legislators which ought never to be done."[6] Mr. Gorham believed "the judges ought to carry into the exposition of the laws no prepossessions with regard to them". for, as Mr. Strong observed.

[1] Farrand, op. cit., II, p 74; Ibid.. p 73; Ibid., I, pp 138.139
[2] Ibid.. II, 74
[3] Ibid., I, pp 97, 98
[4] Ibid., p 109; Ibid.. 98
[5] Ibid., 138. 139
[6] Ibid., II, 75

"the power of making ought to be kept distinct from that of expounding the laws. No maxim was better established."[1] As Mr. pinckney put it, the exercise of this function would give "tincture to their opinions."[2] Mr. Rutledge argued that the executive should get advice from the members of his cabinet; "the judges ought never to give their opinion on a law till it comes before them."[3] These opinions go to show that a mixture of the judicial and executive functions was regarded as improper by a number of the delegates.

Direct affirmation that the national judiciary would have a right to pronounce laws unconstitutional was made in discussions bearing on the executive council. Luther Martin did not believe judges were any better versed in the sphere of legislation than would be the legislature. And "as to the Constitutionality of laws," he said on July 21, "that point will come before the judges in their proper official character. In this character they have a negative on the laws."[4] As a result the judiciary would have a two-fold negative, and in opposing laws favored by the people, as they might have to do occasionally, confidence in them would be weakened.

Improper mixture of executive and judicial functions was not accepted as a weighty objection by either Wilson or Madison. Mr. Wilson contended that "the prepossession to mix itself with the exposition," was an evil associated with advantages that would outweigh any untoward consequences flowing from its adoption.[5] Few cases, thought Madison. would come before a judge during his lifetime which he had already considered while a member of the

[1] Farrand, op. cit., II, 75 [2] Ibid., 298
[3] Ibid., 80 [4] Ibid.. 76. 77 [5] Ibid.. 80

executive council.

National Judiciary

Many important reasons existed why the government should be built anew and among these Sherman included the necessity of making more effectual provision for the security of private rights. and "the steady dispensation of justice." Failure to obtain this under the Confederation produced the convention.

Several modes were open to the convention in accomplishing this end. All were finally abandoned, however, and "the only remaining safeguard to the Constitution and laws of the Union. agst. the encroachment of its members and anarchy among themselves. is that which was adopted. in the Declaration that the Constitution laws & Treaties of the U. S. should be the supreme law of the land. and as such be obligatory on the Authorities of the States as well as those of the U. S."[1] The final appeal must be to the central government, and "it was this view of it which dictated the clause declaring that the Constitution and laws of the United States should be the supreme law of the land, anything in the constitution or laws of any States to the contrary notwithstanding."[2] Credit for the adoption of this means belongs to Luther Martin as Oliver Ellsworth conceded in a document which he wrote criticising Martin.[3]

The difference between the new and the old systems was "in point of political operation." As between "a league or treaty, and a Constitution. the former in point of moral obligation might be as inviolable as the latter. In point of political operation.

[1] Farrand. op. cit.. III. App. A. CCCLXXXVIII. 516; Ibid., CCCXCII. 527

[2] Madison on Nullification. Ibid.. CCCXCVIII. 537. 538

[3] Ellsworth. The Landholder. Ibid.. CLXXXIX. 272. 273

there were two important distinctions in favor of the latter. 1. A law violating a treaty ratified by a preexisting law, might be respected by the Judges as a law, though an unwise or perfidious one. A law violating a constitution established by the people themselves, would be considered as null & void."[1]

The constitution thus established was to be "the supreme law of the land," and the jurisdiction of the national judiciary was extended to cases "arising under the constitution." By "force of logic" at least, whether with deliberate intention or not, the constitution makers gave to the national judiciary power to disregard national statutes. The constitution "defines the extent of the powers of the general government. If the general government should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who to secure their impartiality, are to be made independent, will declare it void."[2]

Most important of all was to establish the principle, as Governor Randolph observed during the debates in the convention, and with this once established it would be the business of a subcommittee to the committee of the whole to work out the details. And so it was unanimously agreed on June 13 to strike out such parts of the resolution as would leave the principle established.[3]

In carrying out the principle thus established, the rela-

[1] Farrand, op. cit., II, 93
Ibid., III, App. A, CLXIII, 241
[2] Ellsworth in Conn. Conv., Ibid., CLX, 240, 241
[3] Farrand, Yates Notes, I, 238

tive place of the national and state judiciaries in the scheme. it It was thought, would be of great importance. Who was to decide in the first instance? Mr. Rutledge declared on June 5 that "the State Tribunals might and ought to be left, in all cases, to decide in the first instance, the right of appeal to the supreme national tribunal being sufficient to secure the national rights and uniformity of judgments." But the clause placed in the constitution was something very different from this to Luther Martin. Replying to The Landholder, March 1788, he states that "as inferior continental, and not state courts, are originally to decide on those questions, it is now worse than useless, for being so altered as to render the treaties and laws made under the federal government superior to our constitution, if the system is adopted it will amount to a total and unconditional surrender to that government."[1]

Many members of the Federal Convention were unable to escape the conviction that the national judiciary should be endowed with power to disregard laws. This, too, in spite of the fact that "it may be a misfortune that, in organizing any government, the explication of its authority should be left to any of its coordinate branches. There is no example in any country where it is otherwise. There is a new policy in submitting it to the judiciary of the U. S."[2] In an address to the Pennsylvania legislature, Morris, referring to a New Jersey law, "which the judges pronounced unconstitutional, and therefore void," said that "no good citizen can wish to see this point decided in the tribunals. Such power in judges is dangerous; but unless it somewhere exists, the time employed in framing a bill of rights and form of govern-

[1] Farrand, op. cit., III, CXCII, 286 [2] Ell. Dev., III-IV, 554, 155

ment was merely thrown away." The necessity of the new judicial power weighed heavily on Mr. Dickinson, who could not agree that the judiciary "should be bound to say that direct violation of the constitution was law. ... Encroachments of the popular branch of the government ought to be guarded against. The Ephori at Sparta became in the end absolute." Although there was a strong moral certainity among the delegates that the national judiciary should have power to declare laws unconstitutional, it was not formally embodied in the constitution.

Several members of the Federal Convention, both in and out of session, declared themselves unequivocally opposed to the principle. Mercer disapproved of the doctrine that the judges should, "as expositors of the constitution, have authority to declare a law void. Laws ought to be well and cautiously made, and then to be uncontrollable." Mr. Dickinson was strongly impressed with the remark of Mr. Mercer, "as to the power of the judges to set aside the law. He thought no such power ought to exist." At the same time, he was unable to suggest a substitute plan. An interesting fact in this connection is that ten years after the convention, Pinckney repudiated the idea. "Upon no subject, " he said, "am I more convinced than that it is an unsafe and dangerous doctrine in a republic ever to suppose that a judge ought to possess the right of questioning or deciding upon the constitutionality of treaties, laws, or any act of the legislature." In a letter to John Quincy Adams in 1818, Pinckney records his change of mind in regard to the legislative negative "very soon after

[1] Sparks, Life of Gouverneur Morris, III, 438
[2] Farrand, op. cit., II, 279
[3] Ibid., 298
[4] Ibid., II, 299
[5] Thayer, Marshall, 66

the convention met."

Evidence that the judicial method of dealing with unconstitutional legislation was seriously thought of by the constitutional fathers is more abundant in amount and more positive in character in connection with the discussions on the council of revision. This evidence has already been considered under that head.

One more interesting comment should be noted. It appears in a letter by Morris, who believed that the judicial negative must exist somewhere within the new system. "Having rejected redundant and equivocal terms," says Morris, "I believed it to be as clear as any language would permit; excepting, nevertheless, a part of what relates to the judiciary. On that subject, conflicting opinions have been maintained with so much professional astuteness, that it became necessary to select phrases, which expressing my own notions would not alarm others, nor shock their self-love, and to the best of my recollection, this was the only part which passed without cavil."

Sparks, Life of Morris, III, p 323

THE CONSTITUTION BEFORE THE STATES---DISCUSSIONS IN THE CONVENTIONS--THE FEDERALIST

After the general convention at Philadelphia had framed the constitution, it was submitted by Washington to Congress and then to conventions in the several states for ratification. In the debates which followed are to be found the opinions of some of the most prominent leaders on the power of the courts to impede the operation of unconstitutional legislation. It was forseen that Congress did not have power to legislate on every subject and that the limitations to its power would be enforced through the intervention of the courts.

Marshall, in the Virginia convention, indicated that the competence of Congress was not absolute. They could not, for instance, make laws affecting the mode of transferring property, or contracts, or claims between citizens of the same state. Can they go beyond their delegated powers? he asked. In case they should make "a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void."[1] Thus many years before Marbury vs. Madison, it appears that Marshall entertained a settled conviction regarding the exercise of this power.

Additional weight may be attached to thse words from a consideration of proceedings in the United States Senate in January 1800. A motion introduced by Mr. Breckinridge to repeal the act

[1] Ell. Deb., III, p 553

for a new organization of the judiciary system was being debated. Mr. Rutledge took Mr. Jefferson at his word, and in seeking the meaning of the constitution on the right of the national judiciary to declare a law unconstitutional, he quoted the words used by Marshall in the Virginia convention. Gen. Marshall, as he said was among the "friends of the constitution."[1]

The importance of the courts as a barrier to laws militating against the constitution was definitely recognized also by Patrick Henry in the Virginia convention. Referring to a previous speaker, he said "the honorable gentleman did our judiciary honor in saying that they had firmness to counteract the legislature in some cases. Yes, sir, our judges opposed the acts of the legislature. We have this landmark to guide us. ... Are you sure that your federal judiciary will act thus? Is that judiciary as well construct, and as independent of the other branches, as our state judiciary. Where are your landmarks in this government? I will be bold to say you can not find any in it. I take it as the highest encomium on this country, that the acts of the legislature, if unconstitutional, are liable to be opposed by the judiciary."[2] The sentiment which Mr. Henry voiced is all the more significant when it is remembered that he opposed the constitution on the ground that the government to be organized under it would be of a consolidated character.

In the Pennsylvania convention, one of the delegates declared the powers given to the judges were dangerous. But Mr. Wilson, for his part, believed the contrary inference to be true and declared that "if a law should be made inconsistent with those powers vested by this instrument in Congress, the judges,

[1]Ell. Deb., III, 553 [2]Ibid., 324, 325

as a consequence of their independence, and the particular powers of government being defined, will declare such law to be null and void; for the power of the constitution predominates. anything, therefore, that shall be enacted by Congress contrary thereto, will not have the force of law."[1] Mr. Wilson had previously taken the same stand while a judge on the circuit.

Marshall, Henry and Randolph in Virginia; Wilson in Pennsylvania, Ellsworth in Connecticut and Davies in North Carolina all discussed the principle of judicial nullification in the ratifying conventions. Their sentiments are summed up in the quotations already given.

The Federalist

Alexander Hamilton stated in the Federalist the grounds on which rests the present constitutional mode for the practical security of each department against the invasion of the other. His trenchant pen proclaimed the dangers from legislative omnipotence and infringements by the states. The barrier best suited to withstand these tendencies was the one finally embodied in the Constitution.

The mass of power under the Constitution was allotted to the central government and after discriminating in theory the several classes of power which in their nature might be legislative, executive, or judiciary, the next and most difficult task was to provide a guarantee for each against any designs cherished by the others.[2] The legislative department was "everywhere extending the sphere of its activity, and drawing all power into its im-

[1] Ell. Deb., op. cit., II, 489
[2] The Federalist (Lodge's ed.) no. XLVII, 308

petuous vortex."[1] Legislative usurpations, moreover, "by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpation."[2] In republican government, "the legislative authority necessarily predominates."[3]

But a government with prominent federal elements in it must also guard against dangers in the direction of the states. The states are prohibited from doing a number of things such as the imposition of taxes on imported articles and the emission of paper money. Such provisions will not be duly regarded "without some effectual power in the government to restrain or correct the infractions of them"[4]

Of what nature must the expedient be? This power "must either be a direct negative on the State laws, or an authority in the federal courts to overrule such as might be in manifest contravention of the Articles of Union."[5] There was no third course, and the latter "appears to have been thought by the convention preferable to the former," declared Hamilton, "and, I presume, will be most agreeable to the States."[6]

And so, in the last analysis, the supreme court was to be the "bulwark of a limited Constitution against legislative encroachments,"[7] state and national. Hamilton, moreover, in his writings, argued that the complete independence of the courts of justice is essential in a limited Constitution. By this type of constitution, he understood "one which contains certain specified exceptions to the legislative authority." It is possible to

[1] The Federalist, op. cit., no XLVIII, 309
[2] Ibid., 309
[3] Ibid., no. LI. 324
[4] Ibid., no. LXXX, 494
[5] Ibid., 494
[6] Ibid., 494
[7] Ibid., no. LXXVIII, 487

preserve limitations of this kind in practice only through the medium of courts, "whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing."[1]

Perplexity has arisen "respecting the rights of the courts to pronounce legislative acts void, because contrary to the Constitution," on the supposition that the doctrine would imply a superiority of the judiciary over the legislative department.[2] "It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void."[3] On what ground then does this doctrine rest?

Hamilton declares there is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. "No legislative act, therefore, contrary to the Constitution, can be valid."[4] To deny this, he said, would be to affirm, "that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid."

What rule of discretion is to guide the courts in the performance of this function? The exercise of judicial discretion is exemplified in determining between two contradictory laws. If

[1]The Federalist, op. cit., no. LXXVIII, 485
[2]Ibid., 485
[3]Ibid., 485
[4]Ibid., 485

the two are irreconcilable and it becomes necessary to give effect to one in preference to the other, the rule "which has obtained in the courts for determining their relative validity is. that the last in order of time shall be preferred to the first."[1] The question then arises whether, between a constitution and a law in controvention, the same rule is followed.

When there is a conflict between the acts of "an original and derivative power, the nature and reason of the thing indicate the converse of that rule as proper to be followed." They teach us, according to Hamilton. that "the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority; and that accordingly, whenever a particular statute contravenes the Constitution. it will be the duty of the judicial tribunals to adhere to the latter and disregard the former."[2]

Hamilton also answered the objection that "the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature." There was no weight in this. This could as well happen in the case of two contradictory statutes; or it might occur in any and every judicial proceeding involving a statute. "The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body."[3] This observation would prove too much, for it would prove that only the legislature should judge a law.

[1] The Federalist, op. cit., 486
[2] Ibid., 487
[3] Ibid., 487

Hamilton went further even than to assert the right of the courts to disregard an invalid law. Should the law be supported by a majority of the people, the judiciary must take the same attitude. But it is easy to see, said Hamilton, "that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community."[1]

[1]The Federalist. op. cit., 488

ORGANIZATION OF THE FEDERAL JUDICIARY

The right of a cooordinate branch to pronounce sentence of unconstitutionality on the acts of another department of government was clearly recognized by the Judiciary Act of 1789. Laws, not only of a state legislature but of Congress, could be accounted of no legal effect by the state judiciaries, subject to an appeal to the supreme court. The law provided "that a final judgment or decree in any suit, in the highest court of law or equity of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or a statute of, or an authority exercised under the United States and the decision is against their validity ... may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error."

Re-organization of the Federal Judiciary

The doctrine of unconstitutionality was vigorously discussed in the United States Senate in 1800 and by Senator Breckinridge of Kentucky, explicitly denied.[1] If the constitution was to be a practical one, he did not believe "the power of the courts to annul the laws of Congress" could "possibly exist." Each of the departments, he said, "are intended to revolve within the sphere of their own orbits, are responsible for their own motion only, and are not to direct or control the course of others; that those for example, who make the laws, are presumed to have an equal

[1] Elliot's Debates, IV. 444

attachment to, and interest in, the Constitution, are equally bound by oath to support it, and have an equal right to give a construction to it." The construction, by each, of its own powers is of as high authority as if done by any other department, while the interpreter is actually more competent to judge of the powers exclusively given to it. The legislature, therefore, "would have an equal right to annul the decisions of the courts, founded on their construction of the Constitution, as the courts would have to annul the acts of the legislature founded on their construction." Although the courts "may take upon them to give decisions which go to impeach the constitutionality of a law, and which, for a time, may obstruct its operation, yet I contend that such law is not the least obligatory because the organ through which it is to be executed has refused its aid. A pernicious adherence of both departments to their opinions would soon bring the question to an issue, which would decide in whom the sovereign power of legislation resided, and whose construction of the Constitution as to the law-making power ought to prevail."[1]

The doctrine, however, was not without its supporters in the upper house. Senator Rutledge pointed to the Judiciary Act of 1789 as evidence in this connection.[2] "As early as the year 1789," he said, "among the first acts of the government, the legislature explicitly recognized the right of a state court to declare a treaty, a statute, and an authority exercised under the United States, void, subject to the revision of the Supreme Court of the United States; and it has expressly given the fin-

[1] Elliot's Debates, IV, 444 [2] Ibid., 447

al power to the Supreme Court to affirm the judgment which is against the validity either of a treaty, statute, or an authority of the government."

It may be of interest in this connection to refer to a rather novel aspect of official public opinion regarding the Judiciary Act. In 1824, Mr. Letcher of Kentucy sponsored a resolution in Congress designed to amend the Judiciary Act so that only by a majority vote of the judges could a state act be declared unconstitutional. An effort was made in 1830 to amend that part of the act "by which the supreme court is empowered to pass upon the constitutionality of state laws." It failed in the House of Representatives by a vote of 137 to 51.[1]

[1] Sumner, Andrew Jackson, 173

FEDERAL PRACTICE--1789-1803

The earliest case[1] involving the relations of Congress and the Federal Judiciary is known as the "first Hayburn case". William Hayburn applied to Associate Judges Wilson and Blair and District Judge Peters of the United States Circuit court for the district of Pennsylvania to be put on the pension list. in accordance with a law of Congress passed in 1792. The court refused to take cognizance of his case.[2]

The judges addressed a letter to the president in which they dwelt upon the sentiments which on "a late painful occasion" governed them with regard to an act passed by Congress. "Upon due consideration." runs the letter. "we have unanimously of opinion. that. under this act, the circuit court, held for the Pennsylvania district, could not proceed; ... Be assured. that. though it became necessary. it was far from being pleasant. To be obliged to act contrary either to the obvious directions of Congress, or to a constitutional principle. in our judgment. equally obvious, excited feelings in us. which we hope never to experience again."[3] This letter was sent to the president shortly after a similar one had been received from John Jay and his associates.

The legal opinion of the time is further indicated in a letter which James Iredell wrote to his wife.[4] He was on the circuit

[1] American His. Rev.. XIII, 283
[2] 2 Dallas(Curtis). 10
[3] Ibid., 10
[4] McRee. Life and Correspondence of James Iredell, II, 361

with Mr. Wilson in 1792. "We have had a great deal of business to do here," he writes, "particularly as I have reconciled myself to the propriety of doing the Invalid-business out of Court. Judge Wilson altogether declines it." We have already seen that Mr. Wilson, who was probably the commanding personality among the judges, had clearly stated his position, on the principle involved, as a delegate to the Federal and Pennsylvania state conventions.

What was the attitude of Congress toward the action of the court? A memorial was presented to the House of Representatives by William Hayburn setting forth the refusal of the court to proceed under the law. Elias Boudinot of New Jersey, who had been an attorney in the Holmes vs. Walton case, was then a member of Congress and from an explanation he gave to the House, the court appeared to consider the duty imposed on them by the late law, "a very extraordinary" one. They looked on the law "as an unconstitutional one." "This being the first instance in which a court of justice had declared a law of Congress to be unconstitutional, the novelty of the case produced a variety of opinions with respect to the measures to be taken on the occasion."[1]

Newspaper comments on the "first Hayburn case" exhibit different shades of opinion. There is both praise and blame for the proceedings in the court. Several refer to the decision as unconstitutional.

Freneau's National Gazette gave a summary[2] of the work of Congress in which this statement appeared: "The decision of the judges against the constitutionality of an act in which the ex-

[1] Annals of Congress, Second Congress, 557
[2] Am. Hist. Rev., XIII, 285

ecutive had concurred with the legislative departments. is the first instance. also. in which that branch of the government has withstood the proceedings of the other."

The agitation engendered by the decision is well shown by what appeared in Bache's General Advertiser for April 20. 1792. "Never was the word 'impeachment' so hackneyed." declares this paper. "as it has been since the spirited sentence passed by our judges on an unconstitutional law. The high-fliers. in and out of Congress. and the humblest of our humble retainers talk of nothing but impeachment! impeachment! impeachment! as if forsooth Congress were wrapped up in the cloak of infallibility, which has been torn from the shoulders of the Pope; and that it was damnable heresy and sacrilege to doubt the constitutional orthodoxy of any decision of theirs, once written on calf-skin!"[1]

Freneau's National Gazette, to quote from this paper again, adopts a more cautious tone on the subject of impeachment. The following statement was made April 23: "We agree ... that humanity is better pleased with the conduct of the judges of the Eastern circuit; but ... they too have, in a delicate manner passed sentence of unconstitutionality on the invalid law. We ... assert that the word 'impeachment' was several times mentioned in the House of Representatives although no motion was made on the subject."[2] Another paper regretted that the humanity of Congress had been thwarted by the action of the judges.

[1] Amer. Hist. Rev., XIII, 285

[2] Ibid., 285

Invalid Pension Act

Under the Invalid Pension Act of March 23, 1792, federal circuit courts were required to receive, and decide upon the merits of, applications for pensions by those who had sustained injuries while in service during the War for Independence. The decisions of the courts were subject to review by the Secretary of War.

Chief Justice Jay, Associate Justice Cushing and District Judge Duane of the Circuit court for the district of New York considered the duty assigned by the act as extra-judicial. While they did not deal with its constitutionality directly, they did state that the act can only be considered as "appointing commissioners for the purposes mentioned in it by official instead of personal descriptions."[1] The judges, however, acted under the law but not in their official capacity. "As the objects of this act are exceedingly benevolent, and do real honor to the humanity and justice of Congress, and as the judges desire to manifest on all proper occasions, and in every proper manner, their high respect for the national legislature, they will execute this act in the capacity of commissioners."[2]

The judges in the case did not content themselves with a declaration simply of their sentiments in regard to the law and their charitable motives for acting as commissioners, but addressed a letter to President Washington containing the same views, with the request that he forward them to Congress. A letter[3] of very much the same character was sent up from Newburn.

[1] 2 Dallas, op. cit., 9
[2] Ibid., 9
[3] Annals of Congress, III, 1319

North Carolina on June 8 by Associate Justice Iredell and District Judge Sitgreaves of the Circuit court for the district of North Carolina.

Edmund Randolph, the attorney general, wrote a letter to President Washington on August 5, 1792, at a time when the rumor was afloat that the latter might not be a candidate for the presidency. The attorney general prophesied that many trying ordeals, the result of which on the public mind could not be foreseen, awaited the judiciary. In this same communication, he states, "It is much to be regretted, that the judiciary, in spite of their apparent firmness in annulling the pension law, are not what sometime hence they will be, a resource against the infractions of the Constitution on the one hand, and a steady asserter of federal rights on the other." He also thought that "the precedent, fixed by the condemnation of the pension law," might justify every constable in thwarting the laws, "If not reduced to its precise principles."[1]

Vanhorne's Lessee vs. Dorrance

This is now regarded as the first case in which a federal statute at variance with the constitution was declared void. The issue grew out of a territorial controversy between Connecticut and Pennsylvania. Settlers from the former claimed land in Pennsylvania under an Indian deed executed by the Six Nations.[2]

Justice Paterson, who, since the constitutional convention

[1] Sparks, Life and Writings of Washington, X, 513
[2] U. S. Reports, 2 Dallas, 304

at Philadelphia, had been elevated to a place in the Supreme Court, discussed the principle at some length on this occasion. Legislatures, he thought, were creatures of the constitution, from whence comes their authority. Therefore, he said, "all their acts must be conformable to it, or else they will be void. ... Whatever may be the case in other countries, yet in this there can be no doubt that every act of the legislature, repugnant to the Constitution is absolutely void."[1] The court, moreover, must so consider it. "I take it to be a clear position," said Justice Paterson, "that if a legislative act oppugns a constitutional principle, the former must give way, and be rejected on the score of repugnance. I hold it to be a position equally clear and sound, that in such case it will be the duty of the court to adhere to the constitution, and to declare the act null and void."[2]

At one stage in his elaborate charge, the court even showed feeling in stating its views. Omnipotence in legislation was declared to be despotism. According to this doctrine, "we are all tenants at will, and hold our landed property at the mere pleasure of the legislature. Wretched situation, precarious tenure! And yet we boast of property and its security, of laws, of courts, of constitutions, and call ourselves free! In short, gentlemen, the confirming act is void; it never had constitutional existence; it is a dead letter, and of no more virtue or avail, than if it never had been made."[3]

[1] U. S. Reports, 2 Dallas, 307
[2] Ibid., 309
[3] Ibid., 316

Calder vs. Bull

"If any act of Congress. or of the legislature of a state." said Justice Iredell in a concurring opinion in Calder vs. Bull. "violates those constitutional provisions, it is unquestionably void; though. I admit. that as the authority to declare it void is of a delicate and awful nature. the court will never resort to that authority but in a clear and urgent case."[1] Justice Chase would not commit himself on the propriety of entrusting the national judiciary the right to declare laws unconstitutional.

A Connecticut law had set aside the decision of a probate court and provided for a new hearing. Counsel for the plaintiffs in this case condemned this legislative act, which granted a new hearing in Calder vs. Bull. as an ex post facto law. prohibited by the constitution; that such a law. state or national. is void; and that the court had the undoubted right to declare a law contrary to the constitution. void. The court decided there was nothing in the constitution to prevent a state from passing a retroactive law touching property right only.[2]

Justice Chase did not believe the legislature was within its rights but declined to say whether the supreme court could declare an act of Congress unconstitutional. If "a government. composed of legislative. executive. and judicial departments were established by a constitution which imposed no limits on the legislative power, the consequence would inevitably be, that whatever the legislative power chose to enact. would be lawfully enacted. and the judicial power could never interpose to pro-

[1] Calder vs. Bull, 3 Dallas, 399
[2] Ibid., 386

nounce it void: it is true, that some speculative jurists have held, that a legislative act against natural justice must, in itself, be void; but I can not think, that under such a government any court of justice would possess a power to declare it so."[1]

In summarizing his views, Justice Iredell holds that if a legislature goes beyond the limits of its authority, "their acts are invalid," for they then "violate a fundamental law, which must be our guide, whenever we are called upon as judges to determine the validity of a legislative act."[2]

Cooper vs. Telfair

"Although it is alleged that all acts of the legislature," observed Justice Chase in Cooper vs. Telfair, "in direct opposition to the prohibitions of the Constitution, would be void; yet, it still remains a question, where the power resides to declare it void. It is, indeed, a general opinion, it is expressly admitted by all this bar, and some of the judges have, individually, in the circuits, decided, that the Supreme Court can declare an act of Congress to be unconstitutional and therefore, invalid; but there is no adjudication of the Supreme Court itself upon the point. I concur, however, in the general sentiment with reference to the period."[3]

The issue in this proceeding grew out of enactments by the legislature of Georgiaas a result of which a certain Cooper and others were driven from the state, and their property confiscated. The circuit court declined to disregard acts of the state legislature, which it had been argued in the trial were contrary to

[1] 3 Dallas, op. cit., 398
[2] Ibid., 399
[3] 4 Dallas, 19

constitution of the state of Georgia.

Justice Cushing also commented on the constitutional aspect of the case. "Although I am of opinion," he said, "that this court has the same power that a court of the State of Georgia would possess, to declare the law void. I do not think that the case would warrant any exercise of the power. The right to confiscate and banish, in the case of an offending citizen, must belong to very government. It is not within the judicial power, as created and regulated by the constitution of Georgia, and it naturally, as well as tacitly, belongs to the legislature."[1]

States Rights

Assertion of the right to declare state legislation unconstitutional brought the national judiciary into conflict with at least two states during the decade of 1790, and culminated in the Kentucky and Virginia resolutions. In Chisholm vs. Georgia, national sovereignty was vigorously maintained by the court, upon refusal by the state to accept service in 1793. Justice Blair, in his opinion, claimed that "when a state by adopting the Constitution has agreed to be amenable to the Judiciary of the United States, she has, in that respect, given up her right of sovereignty."[2] In the conflict with New Hampshire,[3] the state was extremely defiant and declared that it would not admit "the laws made before the existence of the present government by this (then independent state) to the adjudication of any power on earth." This case resulted from the capture by one McClary of

[1] 4 Dallas, 20
[2] 2 Dallas, 452
[3] Haines, op. cit., 52

the "Susanna." which was condemned and ordered to be sold by the admiralty court of New Hampshire. The decision was reversed by the federal Court of Appeals in cases of capture and this reversal was upheld by the supreme court. The attitude of the courts of the nation was considered by New Hampshire a "violation of state independence and an unwarrantable encroachment in the courts of the United States."

KENTUCKY AND VIRGINIA RESOLUTIONS

The passage of the Alien and Sedition Acts by Congress was a victory for the Federalists under the leadership of Albert Gallatin. In their defeat, the Republicans bethought themselves of a means to circumvent their victorious opponents. Resolutions were introduced in the Virginia and Kentucky legislatures. Jefferson and Madison were the authors of these resolutions and among the theories propounded was one which denied, not only to the supreme court but to the central government as a whole, the right to withhold its concurrence in a law. Jefferson and Madison took the position that each state had an equal right to decide for itself.[1]

The Virginia resolutions, of which Madison was the author, declared that the Alien and Sedition Acts were "unconstitutional; and that the necessary and proper measures will be taken by each (state) for cooperating with this state, in maintaining unimpaired the authorities, rights, and liberties reserved to the states respectively or to the people."[2] The Kentucky resolutions, similiar in character, were introduced in the legislature of that state by Mr. Breckinridge. The movement aimed at united action against the central government and copies of the resolutions were circulated among the other states.

In its answer,[3] the legislature of the state of Rhode Island and Providence Plantations observed that the constitution "vests

[1] Kentucky Resolutions, Ell. Deb., IV, 540
[2] Madison, Works, IV, 507
[3] Ibid., IV, 533

in the federal courts, exclusively, and in the Supreme Court of the United States, ultimately, the authority of deciding on the constitutionality of any act or law of the Congress of the United States." The legislature, moreover, did not feel itself "authorized to consider and decide on the constitutionality" of the Alien and Sedition laws.

The replies of other states were equally vigorous in protesting against the theory and practice laid down in the Kentucky and Virginia resolutions. The general assembly of Deleware resolved that to make the states the umpire was an "unjustifiable interference with the general government and constituted authorities of the United States and of dangerous tendency."[1] Massachusetts unmasked the falacy of the resolutions and declared "that the decision of all cases in law and equity arising under the Constitution of the United States, and the construction of all laws made in pursuance thereof, are exclusively vested by the people in the judicial courts of the United States."[2] The Massachusetts chronicle, in referring to the action of the legislature, declared that "as it is so difficult for common capacities to conceive of a sovereign so situated, that the Sovereign shall have no right to decide on any invasion of his constitutional powers; it is hoped for the convenience of those tender consciences who may hereafter be called upon to swear allegiance to the State, that some gentleman skilled in federal logic will show how the oath of allegiance is to be understood, that every man may be so guarded and informed, as not to call upon the Deity to witness a falsehood."[3] For this and another article, the editor and his brother were endicted and sen-

[1] Ell. Deb., op. cit., IV, 532
[2] Ibid., 534; Am. Hist. Rev., V, 59
[3] Am. Hist. Rev., V, 61

tenced to thirty days' imprisonment. The home of Dr. Aaron Hill. the Republican leader in the House, was stoned by a mob of Harvard College students, because of the attitude he had taken on the Kentucky and Virginia Resolutions. The Pennsylvania House entered upon its journal its belief that the people of the United States "have committed to the supreme judiciary of the nation the high authority of ultimately and conclusively deciding upon the constitutionality of all legislative acts."[1] The attitude of the Republicans in this state is shown by an item in a Philadelphia paper asking. "Are not the states as well as the federal government to judge of the Constitution? Is not the Constitution a contract between the different states? Are not they to judge whether this contract be broken or violated?"[2] New Hampshire and Vermont decided that the duty of determining "the constitutionality of the laws of the general government" is "properly and exclusively confided to the judiciary department."[3] The Republicans in the New York House of Representatives adopted a resolution to the effect that "the right to decide upon the constitutionality of laws passed by Congress belongs to the judiciary, the assumption of that power by a state legislature is unwarrantable and dangerous; this House, accordingly, disclaims for itself such a power as that assumed by the legislatures of Virginia and Kentucky. to pass upon either the expediency or the constitutionality of the Alien and Sedition Laws."[4] An article in the "Genius of Liberty" showed the Republicans of New Jersey also hostile to the resolutions; if "the

[1] Amer. Hist. Rev.. V. 51; Ibid., 231
[2] Ibid., V. 51
[3] Ell. Deb., IV, 539
[4] Amer. Hist. Rev., V, 56

states, individually, have no right to judge when the Constitution is violated by Congress, there is an end to all state sovereignty, and state legislation, and we are at once consolidated."[1] Nearly all of the replies, "in terms more or less direct, point to the federal judiciary as the proper authority to decide upon the constitutionality of federal laws."[2] The conviction, it seems, was widespread. in 1800, that the national judiciary had the right to declare unconstitutional, both state and congressional legislation.

[1] Amer. Hist. Rev., V, 55
[2] Ibid., 237

CONCLUSION

In a paper read before the American Historical Association, Professor Austin Scott has divided into three periods the development down to the present time of the right to pronounce laws unconstitutional. The first, he says, prior to the war of independence, was one of germination; the second, one of growing and full consciousness, leading up to and resulting from Marshall's decision in Marbury vs. Madison; the third, the present, evincing two tendencies; the finality of national legislation so far as constitutionality is concerned, the English theory of parliament; the other towards more distinct assertion of this power in restricting state legislation. In the present investigation, the weight of opinion even among pronounced states' rights advocates appears to be on the side of giving the right to the federal judiciary.

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